United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

10-19-76 WHT

76-4054

In the

United States Court of Appeals

For the Second Circuit

RCA Global Communications, Inc.,
Petitioner,

—against—

Federal Communications Commission and
United States of America,
Respondents,

—and—

ITT World Communications, Inc.,
TRT Telecommunications Corporation,
Western Union International, Inc.,
Intervenors.

PETITION FOR REVIEW OF A REPORT, ORDER AND NOTICE OF PROPOSED RULEMAKING OF THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF OF PETITIONER RCA GLOBAL COMMUNICATIONS, INC. IN SUPPORT OF MOTION FOR STAY

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October 18, 1976

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4054

- x

RCA GLOBAL COMMUNICATIONS, INC., :

Petitioner, :

-against- :

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, :

Respondents. :

- x

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Report, Order and Notice of
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No. 76-4054

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-against-

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and UNITED STATES OF AMERICA,
Respondents,

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ITT WORLD COMMUNICATIONS INC.,
TRT TELECOMMUNICATIONS CORPORATION
and WESTERN UNION INTERNATIONAL, INC.,
Intervenors.

REPLY BRIEF OF PETITIONER RCA GLOBAL COMMUNICATIONS, INC. IN SUPPORT OF MOTION FOR STAY

Petitioner RCA GLOBAL COMMUNICATIONS, INC. ("RCA Globcom") submits this brief in reply to the answering submissions of Respondent FEDERAL COMMUNICATIONS COMMISSION ("the Commission") and Intervenors ITT WORLD COMMUNICATIONS INC. ("ITT Worldcom") and TRT TELECOMMUNICATIONS CORPORATION ("TRT").

The brief is offered in further support of RCA Globcom's motion for an Order continuing, pending early plenary review*, an outstanding Agency stay (R. 511) of a proposed re-

* A recent Civil Appeals Scheduling Order of this Court provides for the filing by RCA Globcom of its plenary brief within ten days of submission of this motion, viz., by October 29.

vision (R. 37-43) of the so-called "International Formula". The formula is required by Communication Act §222(e), added by 57 Stat. 5 (1943), 47 U.S.C. §222(e) (1970). It governs The Western Union Telegraph Company's distribution to connecting "international record carriers" (or "IRCs") of telegrams filed with Western Union for delivery to overseas destinations.* (See RCA Globcom Br. pp. 15-20.)

The Central Claim of Competitive Stimulus

Putting to one side the passion of ITT Worldcom and TRT for any formula change likely to confer on them a larger share of Western Union's "unrouted" overseas telegrams than they are entitled to receive under the formula to which they once agreed** (R. 4, 5; see RCA Globcom Br. at pp. 17, 54),

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* Western Union, the sole authorized carrier of domestic telegram traffic, is the only carrier authorized to collect telegrams, domestic or overseas, at points outside of five so-called "gateway cities" -- New York, Washington, San Francisco, Miami and New Orleans. (See RCA Globcom Br. pp. 12-13.) Despite the Commission's current enthusiasm for a contest among the IRCs to woo "routings" of currently "unrouted" traffic (R. 27), the Agency has thus far declined to grant the IRCs the authority to open additional "gateways" or to install procedures allowing "hinterland" customers to file their overseas telegrams directly with an IRC by means of toll-free telephone calls. See International Record Carriers Communications, 40 F.C.C.2d 1082, 1086 (1973).

** At the level of inter-carrier "equity", the basic grievance of ITT Worldcom and TRT is that RCA Globcom receives what they view as a "disproportionate" or "surplus" share of

(footnote continued on following page)

the proponents of the Commission's Order abolishing that formula and ordaining a new "interim" formula offer only one policy justification for this action.

We are told, again and again: (1) the current formula, by supposedly blunting the IRCs' competition for overseas telegram traffic, is, in some way which is never explained, a hinderance to improvements in the overseas telegram service; and (2) the new formula, by stimulating a battle for "routings" will, in some way which also is never explained, act as a stimulant to service improvements.

(footnote continued from previous page)

the unrouted traffic which is filed with Western Union. (ITT Br. at pp. 29-30; TRT Br. at pp. 8-9.) This complaint disregards the fact that this was, for reasons which the Commission made clear at the time, an objective of the formula to which the carriers agreed. As the Commission noted in its Report approving that formula,

> "Accordingly, special provision is made whereby in addition to its quota based on the out-bound traffic handled in 1942, RCAC [now RCA Globcom] receives a substantial volume of unrouted messages to be deducted from the quota of the Western Union cable system. . . . Safeguards are provided so that this adjustment as between the Western Union cable system and RCAC will not unfairly prejudice other carriers. . . ." Separate Report on Formula, 10 F.C.C. 184, 190-91 (1943).

In the proceedings which eventuated in the Commission's Order of January 7, neither ITT Worldcom nor TRT proposed the new formula which the Commission has prescribed and which they now hail. (R. 8) In their filings with the Commission since January 7 they also have dissented, albeit in guarded terms, from the Commission's ultimate vision of all-routed traffic (see R. 646-656, 667-680,

(footnote continued on following page)

Thus, the Commission's brief features (at page 22) the following quotation from the Commission's Report of January 7:

> "We cannot ignore the possibility that[*] quality of service could have been improved absent the inequities of the formula. In any event, by placing distribution of traffic on a rational and competitive basis, we can minimize this danger and maximize the possibility of future benefits. For this reason, we believe the distortions in distribution patterns in the present formula are injurious to the public interest and should be eliminated." (R. 17)

The Commission's brief also invites attention (at page 23) to the Commission's "reaffir[mation of] these findings in even more certain terms" in its further Opinion of September 27. The Court is referred, inter alia, to the Commission's statements that:

> "Our experience convinces us that maintenance of the present service quality and its improvement is more likely where the carriers are required to earn the traffic they receive than where they receive it arbitrarily under a fixed quota." (R. 500)

* * *

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714-717, 733-740) -- the dubious concept (see RCA Globcom Br. at pp. 46-53) which plainly played such a central role in the Commission's prescription of the "interim" formula (R. 27; see FCC Br. at p. 10).

* This formulation -- "we cannot ignore the possibility that" -- may usefully be compared with the text of Communications Act §222(e)(3), which calls for "findings" in any proceeding to annul or prescribe an International Formula.

"We believe, however, that the public will benefit from the new method of distribution through the incentives it provides the carriers to increase their efficiency and to maintain or improve service quality." (R. 506)

The Commission's counsel add their gloss as follows:

"* * * [T]his [the current] manner of distribution provided no incentive to the IRC's to improve service or increase efficiency . . . . The interim formula . . . provided a positive incentive to carriers to provide the best service. The reasons for prescribing the interim formula are not complex or unfathomable, they are clear, straightforward and compelling." (FCC Br. at p. 26)

ITT Worldcom puts it this way:

"[The new formula] assigns a role to customer choice which will have an effect on service quality (R. 17, 501)". (ITT Worldcom Br. at p. 53)

* * *

"[T]he new formula will be a force in the direction of improved service." (Id. at p. 55)

* * *

"[T]he FCC's decision promulgating the interim formula is firmly grounded in considerations of service quality which will be obtained by tying unrouted to routed traffic . . . ."* (Id. at p. 61)

TRT, although it has deferred its discussion of the "merits" to a promised future brief (TRT Br. at p.16),

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* For other samples of rhetoric to the same general effect, see also ITT Worldcom Br. at pp. 59, 62.

joins the chorus. It refers to what it characterizes as the Commission's "acute concern" that

> "the disincentives erected by the [present] formula as to the promotion of message service 'discouraged improvements in [the] quality' of that service. (R. 17)" (TRT Br. at p. 10)

In the context of the present case, these assertions are, we submit, simply unexamined cliches. They are divorced, in both the Commission's Opinions and in the current briefs, from any factual predicate and from any analysis of the conditions of the overseas telegram industry which would suggest they make any sense at all.

It is just this sort of glib, but unexplained, Commission assurance that competition will confer "'considerable benefit in the way of better service [and] responsiveness to public demand'" that the Court found insufficient to sustain a "public interest" finding in Hawaiian Telephone Co. v. FCC, 498 F.2d 771, 775 (D.C. Cir. 1974).* There, as here, the Commission "has done little more than assume that competition is likely to be advantageous." (Id. at 776)

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* The quotation included in this sentence is part of the Court's quotation of the relevant portions of the Agency decision which it vacated, viz., RCA Global Communications, Inc., 37 F.C.C.2d 1043 (1972).

Remanding that case to the Commission, the Court also said that the Agency

> "must go beyond its bare assertion of benefit. It must provide the basic facts which lead it to reach its conclusion of public benefit from the decision. If such basic facts have not been developed in the prior agency proceedings and record, then hearings or supplemental inquiry may be necessary." (Id. at 777) (footnotes omitted)

The proponents' dependence, at this stage of the present proceeding, on little more than unexplained self-serving rhetoric demonstrates both why the "full hearing" which RCA Globcom and WUI sought below, but were denied, is necessary and why, that aside, the findings which underpin the present Order are arbitrary and capricious.

Service quality is, and should be, a legitimate Commission concern. But the questions of how the existing formula affects service quality and how a formula change is likely to affect service quality cannot be answered, as they are here, by a reference to copybook maxims. A proper address to such questions requires the sort of penetrating factual inquiry which Communications Act §222(e)(3) contemplates, but which the Commission has thus far declined to make.

We think, for the many reasons set out in RCA Globcom's principal brief, that there are strong grounds for believing (a) that the existing formula has not hindered

improvements in service quality* (see RCA Globcom Br. at p. 25, R. 17, 197-98) and (b) that the formula shift which the Commission has ordered will, by multiplying traffic solicitation expenses

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* No one has disputed, indeed the Commission's brief has adopted (FCC Br. at p. 2), the showing of our main brief (at p. 13) that the IRCs' contribution to the transmission of an overseas telegram filed with Western Union is typically completed, without manual handling of any kind, in a second or so. If anything "more" is reasonably to be expected in this service, it has not been identified. Moreover, Western Union, which has been steadily improving its own facilities for computerized traffic distribution, will be prepared, by some date next month, to provide full computerized distribution of its overseas traffic under either the current formula or the one which the Commission seeks to implement. (R. 503) (We understand that an attorney from Western Union plans to attend the hearing on October 19 so that he may answer any questions which the Court may have in this regard.) Why a struggle by the IRCs to woo "routings" of unrouted traffic should affect the performance of either the Western Union personnel who receive and process overseas telegrams before they are transmitted or the personnel of the German, British, Japanese, etc. carriers who handle and deliver them after overseas transmission is quite unclear.

Moreover, the disincentive to service improvement which the Commission purports to discern ("[w]e cannot ignore the possibility that" (R. 17)) in the present formula stems from its supposed effect of offsetting carrier gains in routed traffic with losses of unrouted traffic. But, by reason of the "overages" and "deficiencies", which the Commission anomalously views as "distortions" (R. 3), this "offset" effect is inoperative to most overseas destinations (FCC Br. at p. 9) and has been for a long time.

Additionally, RCA Globcom's own success (or lack thereof) in originating traffic of its own is virtually irrelevant in the distribution of "unrouted" traffic. RCA Globcom can originate traffic only in the "gateways" but, under the existing formula, it does not have and never has had a quota in the "gateways" for some two-thirds of the world, viz., the formula's Atlantic and Latin American areas. (R. 51, 61; see also Separate Report on Formulas, 10 F.C.C. 184, 191 (1943).) The traffic

(footnote continued on following page)

of all the IRCs, burden the service (and ultimately its users) with substantial additional, and unproductive costs (see RCA Globcom Br. at pp. 25-26). These, we submit, are propositions of fact about the public interest which should be properly tested and weighed by the Agency before any formula change is permitted to take effect. They have not been.

(footnote continued from previous page)

originations (or lack thereof) to countries in these areas have no effect whatever on the distribution of unrouted traffic.

Finally, each IRC operates, not a host of separate telegram services, but a system which serves many countries and provides many services to which the formula is wholly irrelevant. Thus, operation of the present formula scarcely can be expected to affect in an adverse way the structure and operation of the systems.

POINT I

RCA GLOBCOM DID NOT RECEIVE THE "FULL HEARING" TO WHICH IT WAS ENTITLED

Our principal submission briefs the view that Communications Act §222(e)(3), by requiring a "full hearing" and by laying down substantive standards which depend on detailed factual appraisals for their application, entitled RCA Globcom to a trial-type hearing. (RCA Globcom Br. pp. 28-42) We also showed that, even if Section 222(e)(3) does not have the full reach for which we contend, the Commission abused its discretion under the Administrative Procedure Act by not providing for such a hearing in the plainly adversarial context of this case. (RCA Globcom Br. pp. 43-45)

The proponents of the Commission's Order have chosen to draw the principal issue on the prudential necessity for a hearing, arguing, as the Commission's brief would have it, that the Agency "was involved in a broad policy making proceeding where the determinative facts were not obscure or disputed". (FCC Br. pp. 15-16)

A. The Meaning of Section 222(e)(3)

Before turning to proponents' principal contention, we would add only a few additional comments about the question

of the construction of Section 222(e)(3).

(1) Communications Act §309, a section construed by the Supreme Court United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), contains the Act's only other use of "full hearing". ITT Worldcom's (at Br. pp. 39-43) attempt to distinguish Sections 309 and 222(e)(3), on the ground that the former includes procedural details which are lacking in the latter, is wide of the mark. Most grants of broadcast station licenses, the subject of Section 309, are not controversial in the sense that either the Agency or someone else actively resists the action. The section's procedural details are designed to regulate how a controversy can be created and to make it clear that, if, as a result, an applicant's substantial rights are at stake, he shall have a "full hearing". Such procedural details would be superfluous here. Any contested proposal to change the International Formula -- whether between the IRCs and Western Union or among the IRCs inter sese -- inevitably has the adversarial characteristics of a competitive struggle over a station license.

(2) The Supreme Court did not, as the Commission suggests (FCC Br. p. 18), "assume" in United States v. Florida East Coast Ry., 410 U.S. 224 (1973), that the statutory term "full hearing" of Morgan v. United States, 298 U.S. 468 (1936) and 304 U.S. 1 (1938), "does not differ significantly" from the "hearing" term at issue in Florida East Coast Ry. The

Court made its assumption "arguendo" (410 U.S. at 243) (which suggests the Court does not think much of the Commission's suggested equation) for the sake of a point which is not at issue here.

(3) ITT Worldcom's efforts to distinguish Morgan and The New England Divisions Case, 261 U.S. 184 (1923), on their facts (ITT Worldcom Br. pp. 42-43) also are off the mark. The essential point here is to ascertain Congress' intent when it employed the words "full hearing" in Communications Act §222(e)(3). It is plain that Morgan was, in 1943, a "great" case which, at that time, had made "full hearing" the symbol, the preferred term of art, for expansive procedural protections of an essentially judicial type.*

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* In this connection, it is worthy of note that, when the Administrative Procedure Act was passing through the Congress in 1946, the presently relevant language of what now is 5 U.S.C. § 553(c)(1970) -- "Where rules are required by statute to be made on the record after opportunity for an agency hearing" -- acquired that form in the Judiciary Committee of the House of Representatives. The Committee report noted with respect to this language:

> "The change is made to conform to the language used in the introductory clause of section 5 respecting adjudications. A statute may, in terms, require a rule or order to be made upon the record of a hearing, or in the usual case be interpreted as manifesting a Congressional intention so to require, and in either situation sections 7 and 8 would apply save as other exceptions are operative." H.R. Rep. 1980, 79th Cong., 2d Sess. (1946) as printed in Administrative Procedure Act Legislative History, S.Doc. 248, 79th Cong. 2d Sess. (1946) at p. 285 n.9 (emphasis supplied).

B. The Need for a Hearing

ITT Worldcom quotes (at Br. p. 36) Independent Bankers Ass'n of Georgia v. Board of Governors of the Federal Reserve System, 516 F.2d 1206 (D.C.Cir. 1975), for the proposition that "an agency is not required to conduct an evidentiary hearing when it can serve absolutely no purpose" (id. at 1220).

More in point here, however, is that decision's following sentence:

> "The case law in this Circuit is clear that an agency is not required to conduct an evidentiary hearing when it can serve absolutely no purpose. In such a circumstance, denial of a hearing may be proper even though adjudicatory proceedings are provided for by statute. The agency, however, carries a heavy burden of justification. Where Congress has plainly given interested parties the right to a full hearing, the agency must show that the parties could gain nothing thereby, because they disputed none of the material facts upon which the agency's decision could rest." (Ibid.)

In a footnote dropped from this statement, the Court invites attention to its earlier comment in Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125 (D.C.Cir. 1969), that

> "questions of public interest confronting an administrative agency will often be illuminated by an exploration in greater depth than can be provided simply by pleadings and documents." (Id. at 1129)

Here the Order's proponents insist either that facts have little or nothing to do with a proper disposition of this case -- it is all a matter of "broad policy" (FCC Br. p. 15; cf. R. 8 fn. 10) -- or that RCA Globcom is "now present[ing] for the first time" a "laundry list of specific matters" which could have been presented on affidavit below (ITT Br. at pp. 19-20). "Laundry list" is ITT Worldcom's pejorative for the enumeration, at RCA Globcom Br. pp. 44-45, of matters which warranted trial-type inquiry.

It seems plain, to us at least, that the "laundry list" puts in controversy "material facts upon which the agency's decision could rest", Independent Bankers Ass'n of Georgia, supra, 516 F.2d at 1220. And it is simply nonsense to say that we raise these matters for the first time. The "list" simply specifies, in terms of the limited record the parties were allowed to make, issues framed by the Commission's Designation Order which initiated this proceeding in 1973. (Compare R. 77-78 with RCA Globcom Br. pp. 44-45). RCA Globcom addressed all of these issues below in the

restricted manner which the Commission allowed. (See, e.g., R. 193, 258-60, 416-19 (sales solicitation expense);R. 195-98 (service quality); R. 198-200 (rate considerations); R. 200-02 (public interest effects).)

These issues could not be properly developed on paper. It is not a question, as ITT Worldcom would have it, of "credibility" (ITT Br. pp. 34-35), but of exposition and tested analysis sufficient to ground a decision in an adversarial context.

The Court, though commenting in Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C.Cir. 1973) about the Natural Gas Act, spelled out the essential distinction:

> "Informal comments simply cannot create a record that satisfies the substantial evidence test. Even if controverting information is submitted in the form of comments by adverse parties, the procedure employed cannot be relied upon as adequate. A 'whole record,' as that phrase is used in this context, does not consist merely of the raw data introduced by the parties. It includes the process of testing and illumination ordinarily associated with adversary, adjudicative procedures. Without this critical element, informal comments, even by adverse parties, are two halves that do not make a whole. Thus, it is adversary procedural devices which permit testing and elucidation that raise information from the level of mere inconsistent data to evidence 'substantial' enough to support rates." (Id. at 1260) (emphasis in original)

This was not a "summary judgment" case. It should not have been treated on a paper record.*

C. Proponents' Other Invalid Contentions

ITT Worldcom also urges that RCA Globcom did not ask for a trial-type hearing or "waived" its right to such a hearing. (ITT Br. p. 33). The short answer to these arguments is to be found in the Commission's Report of January 7 and in its Memorandum of September 27. The Commission had no doubt about either the kind of hearing Globcom wanted or about the procedural propriety of its request. The agency simply denied the request on the "merits" as it mistakenly saw them. (R. 8 fn. 10, R. 498-99.)

It is plain that RCA Globcom, while striving to do the best it could within the procedural framework provided by the Commission, preserved its claim to trial procedures throughout. (R. 83-84, 204, 324.) ITT Worldcom did not present a "waiver" argument when the trial-hearing issue was before the Commission on the various applications of this past Spring. (R. 556-57.)

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* This is especially so when the customary objections to trial-type rule makings -- many parties and undue delay -- are not pertinent here. The parties concerned with the shape of the International Formula are few in number and readily identifiable. It also is hard to believe that an Administrative Law Judge intent on "moving" his calendar would have required more time to develop an adequate record than the Commission, in its effort to act fairly within a defective procedural mode, took to develop its inadequate one.

POINT II

THE COMMISSION'S FINDINGS DO NOT SUPPORT ITS ORDER

It is undisputed that the Commission has not, in terms, found that its "interim" formula "will be just, reasonable, equitable, and in the public interest." (See RCA Globcom Br. pp. 46-50.) The Order's proponents, needless to say, urge that the Agency's Report contains, by implication, the findings demanded by Communications Act § 222(e)(3). (See FCC Br. p. 22; ITT Br. p. 20 fn. *.)

The Report is said to be "rife" with "the statutory words of art or their equivalent". (Ibid.) These, it seems clear to us, are largely addressed, not to the "interim" formula, but to the Commission's denunciation of the present formula and to the speculative virtues of the all-routed concept which remains over the horizon. The parties have, in any event, reached the stage of the argument at which the Report will have to speak for itself.

With respect to the adequacy of the findings which support the Commission's prescription of the current formula (see RCA Globcom Br. pp. 54-59) and the Commission's improper use of "competition" as the touchstone of the "public interest", the parties' conflicting positions have been clearly posed. We see little point pressing redundant argument upon the Court.

POINT III

A CONTINUATION OF THE EXISTING STAY PENDING EARLY PLENARY REVIEW WOULD BE APPROPRIATE

The Commission released its second full-dress opinion in this matter on September 27. (R. 497-511) RCA Globcom is scheduled to file its plenary brief by October 29. How quickly thereafter the Docket goes forward to final argument would seem to be mainly a function of the Commission's wishes as to answering papers.

Under such circumstance it would be appropriate, we submit, to continue the existing administrative stay pending final decision in this Court if it appears likely that the Commission's Order will, in the end, be set aside. No one has pointed to any identifiable benefits which communications users will derive from an immediate formula shift; the industry and public should not be exposed to the burdens of two formula shifts -- one to the new formula and one back -- if the Commission's Order is unlikely to survive plenary review.

ITT Worldcom complains that it has already been too long delayed by RCA Globcom -- the plenary argument

should have been held last June (ITT Br. at pp. 9-10). This grievance is, in reality, directed against the Commission. The latter's "vice" is that it has refused, in the public interest, to grant to ITT Worldcom the Order it wanted when it wanted that Order.

The Commission's Order of March 5, 1976, which first stayed its basic Order of January 7, said in pertinent part:

> "[W]e believe that the public interest will be best served by staying the effectiveness of our January 7 Report and Order until we have resolved those matters raised in the above petitions [referring to petition of Western Union, WUI, and RCA Globcom]"* (R. 529)

Pointing to the stay motion which RCA Globcom then had pending in this Court, the Commission said "we believe it important that the court have the benefit of our consideration of these matters." (R. 530) This Court's subsequent Order (R. 537-38) adjourning RCA Globcom's stay motion and annulling the scheduling order which Staff Counsel Fensterstock had, by then, issued, was not "obtained" by RCA Globcom (ITT Br. p. 64). Rather it was entered upon the joint motion of petitioner and of the Commission. (R. 531, 537)

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* One of these applications was a petition by WUI for reconsideration. Thus, RCA Globcom's plenary brief will be on file a month before the statutory time to Petition for Review in this Court has expired.

The Commission, in its further opinion of September 27, noted that "[i]t was beneficial for all concerned to allow us time to consider RCA's and WUI's arguments." (R. 510) The point, in final analysis, is that the Commission's attention to what it saw as its public responsibility creates no private "equity" which is relevant here.

The suggestions of the Commission (FCC Br. p. 30) and of TRT (Br. p. 22) that the monetary loss which RCA Globcom will suffer by an improvident formula shift does not count as "irreparable injury" are unsound. Both rely upon an incomplete quotation from Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C.Cir. 1958), which, in fuller text, reads:

> "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. But injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits." (Id. at 925)

This is merely a restatement of the familiar principle that preliminary equitable relief is generally inappropriate if an adequate damage remedy exists. But there is, of course, no

such alternative here. Traffic taken from RCA Globcom by reason of a formula shift will not be recoverable at a later date if this Court then finds the interim formula to have been improperly prescribed.

ITT Worldcom and TRT are left only with the argument that a delay of the formula shift pending an early plenary review will cost them money -- a contention which they seek to dramatize with convoluted bonding proposals. At this stage of their argument, intervenors conveniently forget that the Commission proceeding, however adversarial its character, is rulemaking.

An Order prescribing an International Formula, like any rule, speaks to the future. Unlike an adjudication, a valid Order does not recognize claims or rights which have some existence apart from the proceeding for their vindication. Rather it creates a source of rights not previously in existence. Until such an Order properly takes effect those who foresee gain under its terms have acquired nothing to "lose" or "harm". As the Commission's Order of January 7 is defective and invalid in several respects, this consideration undermines Intervenors' claim that they will be "substantially harmed" (see Eastern Air Lines, Inc. v. CAB, 261 F.2d 830 (2d Cir. 1958)) by a delay in its implementation pending plenary review.

Moreover, as the Court also wrote in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 924 (D.C.Cir. 1958):

> "Parties aggrieved by administrative agency orders act as representatives of the public interest in seeking judicial review. As it is principally the protection of the public interest with which we are concerned, no artificial restrictions of the court's power to grant equitable relief in furtherance of that interest can be acknowledged."

In the novel circumstances of this case, the Court should, we submit, give decisive weight to its appraisal of the likely outcome of the final proceedings which are scheduled for the immediate future.

CONCLUSION

The Commission's Order of January 7 is defective. The existing stay of its effectiveness should be continued pending plenary consideration by this Court.

Respectfully submitted,

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